IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6020 of 2006

Mr.Mohamad Ali Khajamiya Kazi .. Petitioner

versus

Shri Abidalli Khajamiya Kazi & Ors. .. Respondents

...

Mr.Dilip Bodake for the petitioner.

Mr.Rahul Kadam i/b Uday Warunjikar for respondent nos.1, 2, 4, 5 and 11.

CORAM : D.G. KARNIK, J

DATED : 30th August 2007.

P.C.:

1. Heard Mr.Bodke for the petitioner and Mr.Rahul Kadam, appearing on instructions of Mr.Uday Warunjikar for respondent nos.1, 2, 4, 5 and 11. Rest of the respondents are absent though served with the notice that Writ Petition would be disposed of at the stage of admission itself.

2. By this petition, the petitioner who is

original defendant no.1, challenges the order dated 5th July 2006 passed by the learned Civil Judge, Sr. Division, rejecting his application under Order 1 Rule 10 of the Code of Civil Procedure (for short "the CPC") for joining certain persons as parties to the suit.

3. The respondent no.1 filed a suit against the petitioner and other respondents for partition of the suit properties. The petitioner while contesting some of the averments made in the plaint by his written statement also claimed partition of the suit properties. In paragraph no.18 of the written statement, he specifically stated that he also wanted partition of the suit properties and was willing to pay necessary court fee stamp for partition and separating his share in the suit properties.

4. The petitioner thereafter made an application in the suit under Order 1 Rule 10 of the CPC saying that some other persons also have a share in the suit properties and they were the necessary parties to the suit and therefore should be joined as parties to the suit. Respondent no.1 opposed the said application. By the impugned order, the learned

Civil Judge rejected the said application.

4. The impugned order is very laconic and consists of only three sentences. The order being small is quoted verbatim

> "The Plaintiff is competent to look after his suit. No reason to give direction to Plaintiff to add parties or to make amendments. Hence rejected."

5. In my view, the order needs to be set aside. In a suit for partition by a coparcerner or co-owner against other coparcerners or co-owners each of the defendants who has a share in the property and who also claims partition is so to say in the position of a plaintiff in the suit. It is for this reason that when a that defendant in such suit makes an application for transposition as a plaintiff it is often granted. This is also because the defendant also claims partition and a share in the property. Where one of such defendants who claims a share in the property makes an application to the court that a third person, who is not a party to the suit also has a share in the property and should be joined as

parties to the suit, he is doing so for his own interest in as much as decree for partition and separation of his share could be adversely affected if the third persons who has share in the property is not before the court as such third persons can raise the objection for execution of the decree. In the circumstances, the trial court clearly erred in saying that plaintiff would look after his own suit and defendant has no reason to compell the plaintiff to join any other person as party to the suit. The petitioner who was the defendant no.1 was certainly interested in ensuring that all persons who have a share in the property are parties to the suit so that a decree for partition which may ultimately be passed in favour of the plaintiff and his own favour can be executed without objection and obstruction from any other person who has a share but not joined as party to the suit. Whether the third persons have a share in the property or not is an issue which may be framed at the trial and may be decided appropriately. It cannot be said without trial of the suit that such third persons have no share in the property especially when their names do appear in the record of rights.

6. In the circumstances, the Writ Petition is allowed. Impugned order is set aside and the application made by the petitioner defendant no.1 at Exhibit 85 in the suit is allowed. Respondent no.1 shall carry out the amendment in the suit within a period of four weeks of the writ reaching the trial court. In the event the plaintiff does not carry out the amendment, petitioner is at liberty to carry out the amendment and join the third persons as parties to the suit.

(D.G. KARNIK, J)